

REMARKS

In the Office Action, claims 1-7, 9-31, and 41-50 are pending in the application. Claims 1-7, 9-12, 15-29, 31, and 41-50 have been rejected on the ground of nonstatutory obviousness-type double patenting as been unpatentable over claims 1-33 of U.S. Patent No. 7,073,804. This rejection is respectfully traversed.

The present application was filed on July 3, 2002, and has been pending without any continuations since that date. The principal reason for the long pendency of this application is the appeal which was taken to the Board of Patent Appeals and Interferences which was decided in part in favor of Applicants, resulting in the allowance of some of the claims in this application. Prior to the appeal in this application, certain claims were allowed. A continuation application was filed adding claims substantially the same as the allowed claims in this application prior to appeal. This continuation application became U.S. Patent No. 7,073,804. Thus, '804 patent issued prior to the issuance of the present application but was filed after the filing date of the present application and was based on this application. Under the circumstances, it is believed that the '804 patent is not a "prior patent" as set forth in the case law for double patenting.

The Doctrine of double patenting seeks to prevent the "unjustified" extension of a patent exclusivity beyond term of first to issue patent. See MPEP804, page 800-11. The rationale behind the double patenting rejection is twofold; (1) was the right to exclude granted by the first patent which may be "unjustly" extended by the grant of a later issued patent or patents; and (2) the possibility that an infringer could be subject to multiple lawsuits due to the separate ownership of two patents which are not patentably distinct.

The policy surrounding the first reason for a double patenting rejection has been largely abrogated by the amendments to 35 USC. § 154(d) which limits the term of those patent applications filed after May 29, 2000, to 20 years from the filing date. This limitation relates to all applications which claim priority to the earliest filed application. Therefore, in terms of the first policy reason for the preclusion, the present application and the Hawes '804 patent have the same terminal date, except as either application may be extended under the provisions of 35 USC.

§ 154(b). However, this statutory provision did not affect the second policy reason for a double patenting rejection. Therefore, Applicant submits herewith a terminal disclaimer to the comply with the second reason for the double patenting policy, namely to avoid the possibility that an infringer could be subject to multiple lawsuits due to the separate ownership of two patents which are not patently distinct.

According to the Terminal Disclaimer submitted herewith, the owner of the current application agrees that any patent granted on this application shall be enforceable only for and during such period as it and the prior patent (the Hawes '804 patent) are commonly owned. Therefore, this Terminal Disclaimer will obviate any concern about double patenting with respect to the lack of common ownership of any patent issuing from this application and the Hawes '804 patent.

In view of the fact that any extension of any patent issued by this application has resulted only from a delay in the Patent Office, any extension granted to this application has not been disclaimed because of such extension cannot be said to be unjustified in terms of the policy. Indeed, Congress sought to avoid any loss of patent rights due to the failure of the Patent Office to issue a patent within three years by extending the term of any patent that was delayed by the Patent Office under certain conditions. Therefore, the Terminal disclaimer filed herewith does not disclaim any extension of the term of any patent issuing from this application that has been granted by the USPTO under the provisions of 35 U.S.C. § 154 (b).

In view of the foregoing, it is believed that the basis for double patenting has been overcome by the Terminal Disclaimer filed herewith.

In view of the foregoing remarks and the submission of the Terminal Disclaimer enclosed herewith, it is believed that all claims in this application are in condition for allowance. Early notification of allowability is respectfully requested.

Both of the present application and the Hawes '804 patent are owned by Fleet Engineers Incorporated. The Hawes '804 patent confirms the ownership of that patent at the time of issuance of the patent and the undersigned attorney represents to the Patent Office that the ownership of the Hawes '804 patent has not changed. The present application is also assigned to

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Fleet Engineers Incorporated. A copy of the recorded assignment of this application to Fleet Engineers Incorporated is enclosed herewith.

In view of the forgoing remarks and the Terminal Disclaimer filed herewith, it is believed all of the claims are in condition for allowance. Early notification of allowability is respectively requested.

Respectfully submitted,

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